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IN THE

Supreme Court of the United States

October Term, 1948

No. 586

DANIEL G. MARSHALL,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA, a Public Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

Petitioner, who is not a Negro, applied to the Supreme Court of California, in an original proceeding, for an alternative writ of mandate commanding respondent, The State Bar of California, and its Board of Governors, in effect to sever all connections with The Los Angeles Bar Association on the ground that the bar association denies membership to Negro lawyers as a matter of practice. [R. 1 to 14.] The petition and a subsequent petition for rehearing were denied without opinion. [R. 28 and 31.]

Respondent respectfully submits that Certiorari should not be granted because petitioner has no standing to raise the constitutional issues which he attempts to present, and further because no Federal question was decided by the State Court.

Because these features stand out so sharply, respondent will not burden this Court with a consideration of the many other points raised in petitioner's brief herein.

Questions Presented.

1. Whether a person not a Negro has standing in this Court to claim a denial of constitutional rights to Negroes.

2. Whether this Court will review State Court orders which did not adjudicate a Federal question.

ARGUMENT.

I.

The Petitioner, Not Being a Negro, Has No Standing to Claim That Respondent Has Discriminated Against Negroes in Violation of the Federal Constitution.

The Petition for Writ of Mandamus [R. 4, par. 17], the Petition for Writ of Certiorari herein, as well as the Brief in support thereof, and in particular the Specifications of Errors therein at page 15, all proceed on the basis that respondent had unconstitutionally discriminated against *Negroes*. Petitioner, in his Petition for Writ of Mandamus below, did not allege that he was a Negro and in fact excluded himself from that category [R. 4, Pet., par. 16.] In his Petition for Rehearing below [R. 29] petitioner did not deny that he was not a Negro, though that had been the basis of paragraph 1 of the Points and Authorities of The Los Angeles Bar Association below [R. 19].

Thus the situation that was here in *Tileston v. Ullman*, 318 U. S. 44, is once again presented. There the appeal was dismissed since the appellant asserted that a state

statute deprived his patients, not himself, of rights secured under the Federal Constitution. Applying the rule that has been adhered to from the early days, the Court held at page 46:

> "* * * The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life—obviously not appellant's but his patients'. There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf. Cronin v. Adams, 192 U. S. 108, 114, 48 L. ed. 365, 24 S. Ct. 219; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 S. Ct. 784; Bosley v. McLaughlin, 236 U. S. 385, 395, 59 L. ed. 632, 636, 35 S. Ct. 345; Blair v. United States, 250 U. S. 273, 63 L. ed. 979, 39 S. Ct. 468; The Winnebago (Iroquois Transp. Co. v. DeLaney Forge & Iron Co.), 205 U. S. 354, 360, 51 L. ed. 836, 839, 27 S. Ct. 509; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 220, 47 L. ed. 778, 781, 23 S. Ct. 498. No question is raised in the record with respect to the deprivation of appellant's liberty or property in contravention of the Fourteenth Amendment, * * *."

See, also:

Columbus & G. R. Co. v. Miller, 283 U. S. 96, 99 100;

Liberty Warehouse Co. v. Burley etc. Assn., 276 U. S. 71;

Ashwander v. T. V. A., 297 U. S. 288, 347, 348.

Petitioner has no standing to claim or set up the constitutional issues which he attempts to bring here.

II.

The State Court Below Did Not Decide Any Federal Questions.

This Court, from its beginning, has consistently applied the rule that it will not review orders of State Courts that rest on adequate and independent state grounds. (*Herb v. Pitcairn*, 324 U. S. 117, 125, 126.) While an attempt was made in the petition below to present Federal questions to the State Court [R. 4, Pet., par. 17], that Court did not in its orders adjudicate any such questions.

The petition below was filed in the Supreme Court of California as an *original* proceeding. That Court exercises concurrent jurisdiction with the District Courts of Appeal (intermediate appellate courts) and the Superior Courts (trial courts of first instance) in the issuance of prerogative writs, including mandamus. (Pet. Br. pp. 5 and 6.)

A petitioner, however, is not entitled to such a writ as a matter of right—its issuance is discretionary with the Court. (*Friedland v. Superior Court*, 67 Cal. App. 2d 619, 628; *Sipper v. Urban*, 22 Cal. 2d 138, 141.) A writ of mandamus will not be granted unless it is necessary "to protect a substantial right" and only when there is a showing that "some substantial damage will be suffered by the *petitioner* if the writ is denied." (Italics supplied.) (*Thomasson v. Jones*, 68 Cal. App. 2d 640, 642; *Friedland v. Superior Court*, 67 Cal. App. 2d 619, 628; *Ault v. Council etc. of San Rafael*, 17 Cal. 2d 415; *Fritts v. Charles*, 145 Cal. 512, 513; *Funeral Directors Assn. v. Board of Funeral Directors*, 67 Cal. App. 2d 311, 313; Calif. Code of Civil Procedure, sec. 1086.) Because the Superior Courts have concurrent jurisdiction with the Supreme Court in the issuance of such writs, because Superior

Courts are in a much better position to determine questions of fact, and because of the undue burden that would otherwise be imposed on the Supreme Court, that Court has adopted "* * * a rule governing the discretionary action of the court in passing upon an application for a prerogative writ, that such applications will not be entertained where there is no sufficient reason shown why the application was not made in the superior court." (*Brougher v. Board of Public Works*, 107 Cal. App. 15, 20; Rules on Appeal, Rule 56(1), 22 Cal. 2d 35; *Roma Macaroni Factory v. Giambastiani*, 219 Cal. 435, 437; *Imperial Land Co. v. Imperial Irrigation District*, 166 Cal. 491; *Brougher v. Board of Public Works*, 205 Cal. 426, 440.)

Without examining the petition below further, we can see that on the above mentioned points alone the Supreme Court of California was justified in the exercise of its discretion, in denying the original application before it. That such petition discloses no necessity to protect a substantial right of *petitioner* therein and does not show that substantial damages will be suffered by *petitioner* if the writ is denied, is at once apparent even if we should assume for sake of argument that it presents a need to protect a substantial right of Negroes and that such persons will sustain substantial damages if the writ is denied. Nor does the petition show a sufficient reason why it was not originally presented to the Superior Court. The "peculiar emergency or exigency" relating to the meetings of the Conference set for September 14 and 15, 1948, which was asserted in the petition below [R. 6, Pet., par. 18]*

*Though the Transcript of Record is silent on the subject, the Petition for Writ of Mandate below was filed September 10, 1948.

as a reason rendering it proper for the California Supreme Court to exercise original jurisdiction, no longer existed when that Court on September 23, 1948, denied the petition [R. 28]. And, of course, as to all the points mentioned in this paragraph, this Court will not review the determination made thereon by the Supreme Court of California. (*Herb v. Pitcairn*, 324 U. S. 117, 125, 126.)

Where, as in the instant case, the Supreme Court of California, in its initial action, declines to issue a prerogative writ on an *ex parte* application by denying the petition before the issuance of an alternative writ, such action "* * * is not an adjudication upon the merits of the facts presented in the application," but constitutes "simply a refusal by this court to exercise its *original* jurisdiction." (Italics supplied.) (*Funeral Directors Assn. v. Board of Funeral Directors*, 22 Cal. 2d 104, 110; *McDonough v. Garrison*, 68 Cal. App. 2d 318.)

Accordingly, the Supreme Court of California did not adjudicate any of the Federal questions which the petitioner attempted to assert in the petition below, thus making applicable the rule that:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." (*Herb v. Pitcairn*, 324 U. S. 117, 125.)

And it is axiomatic that:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that

its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it." (*Lynch v. New York ex rel Pierson*, 293 U. S. 52, 54.)

Conclusion.

Respondent respectfully submits that certiorari should not be granted because it is apparent that the Supreme Court of California has not decided any Federal question; furthermore, because the petitioner patently has no standing to raise the constitutional issues which he attempts to assert in his various petitions below and here.

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